No. 80-780

MICHAEL RODAK, JR.

In The Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., PETITIONER,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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MEMORANDUM FOR THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AS *AMICUS CURIAE*

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MEMORANDUM FOR THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AS *AMICUS CURIAE*

The International Association of Drilling Contractors, with the consent of the parties, submits this memorandum *amicus curiae* in support of the petition for a writ of certiorari.

INTEREST OF THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS

The International Association of Drilling Contractors is a trade association that represents the interests of

the oil and gas drilling industry. Many of the Association's members are drilling contractors who own or operate off-shore drilling rigs. The efficient and economical operation of such drilling rigs requires that employees remain off-shore on the rig for a tour of duty lasting several days. To facilitate this method of operation, the drilling contractor, for its own convenience, provides the employees with meals and lodging on the rig without charge. The Association and its members therefore have an obvious interest in this case, which presents the question whether the fair market value of such meals and lodging constitutes "wages" on which the employer must pay Social Security ("FICA") and Federal Unemployment Insurance ("FUTA") taxes.

SUMMARY OF ARGUMENT

The decision below is inconsistent in principle with this Court's decision in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), and it squarely conflicts with *Royster Co.* v. *United States*, 479 F.2d 387 (4th Cir. 1973), *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1032 (1980), and *Oscar Mayer & Co., Inc.* v. *United States*, 623 F.2d 1223 (7th Cir. 1980). The question presented is important to the administration of the federal tax laws. Accordingly, the petition for a writ of certiorari should be granted to resolve the existing conflict among the courts of appeals and to decide an important question of federal law.

ARGUMENT

1. The Decision Below Conflicts With Decisions Of This Court And Other Courts Of Appeals.

The FICA tax is calculated as a percentage of the employee's "wages." *See* 26 U.S.C. §§3101(a) and 3111(a). An employer must withhold the employee's portion, and pay the employer's portion, of this tax. *See* 26 U.S.C. §§3102(a) and 3111(a). The FUTA tax, which is paid solely by the employer, also is calculated as a percentage of the employee's "wages." *See* 26 U.S.C. §3301. The definition of "wages" is the same for each tax: "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash. . ." 26 U.S.C. §§3121(a) and 3306(b). The question presented in this case concerns the application of this statutory definition to meals and lodging furnished by the employer for its own convenience.

The court of appeals held that the fair market value of meals and lodging furnished by an employer to its employees without charge, solely for the convenience of the employer, constitutes "wages" and therefore that the employer must withhold and pay FICA and FUTA taxes based upon a percentage of that fair market value. In so holding, the court largely ignored the teaching of this Court's decision in *Central Illinois* and expressly rejected as incorrect the decisions of the Fourth and Seventh Circuits in *Royster* and *Oscar Mayer* and of the Court of Claims in *Hotel Conquistador*.

In *Central Illinois*, this Court was confronted with the question whether cash reimbursements for lunch expenses constituted "wages" for the purpose of the employer's obligation to withhold federal income taxes. "Wages," for that purpose, is defined by statute as "all

remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash. . . ." 26 U.S.C. §3401(a). This Court held that reimbursement for the reasonable expenses of meals incurred in travel on the employer's business was not "remuneration" and therefore did not constitute "wages" giving rise to an obligation to withhold. The Court reasoned:

> An expansive and sweeping definition of wages . . . is not consistent with the existing withholding system. . . . Congress chose simplicity, ease of administration, and confinement to wages as the standard. . . . This was a standard that was intentionally narrow and precise.

435 U.S. at 31.

It necessarily follows from *Central Illinois* that the value of the meals and lodging furnished by petitioner in this case did not constitute "wages" for purposes of federal income tax withholding: if in *Central Illinois* reimbursement for meals was not "wages," *a fortiori* actual meals and lodging, provided to employees solely for the convenience of the employer, are not "wages." Indeed, the government now concedes that such meals and lodging are not "wages" for the purpose of income tax withholding. *See* Pet. App. B, p. 4a.

But it also follows from *Central Illinois* that meals and lodging furnished to employees for the convenience of their employer cannot be "wages" for FICA or FUTA tax purposes. For the purposes of FICA and FUTA taxes, just as for federal income tax withholding, the question whether an item constitutes "wages" turns on whether it was paid or provided as remuneration for employment services. The same "intentionally narrow

and precise" standard governs the employer's obligation under each of the three separate taxing schemes.[1] Thus if an item is not "wages" for the purpose of federal income tax withholding, it is not "wages" for FICA or FUTA tax purposes either.

Moreover, to treat the fair market value of meals and lodging furnished for the convenience of the employer as "wages" giving rise to an obligation to pay FICA and FUTA taxes would frustrate the congressional objectives of simplicity and ease of administration identified by this Court in *Central Illinois*: the employer would be required not only to conform to different standards under the different withholding statutes but also to determine its liability for FICA and FUTA taxes on the basis of speculative assessments of fair market value.

These and other considerations have led other lower federal courts to hold that items similar to the meals and lodging involved here do not constitute "wages" for purposes of FICA and FUTA taxes. Thus, even before this Court's decision in *Central Illinois*, the Fourth Circuit in *Royster* held that reimbursements for lunch expenses, incurred in the course of travel on the employer's business, "were not wages as that term is used in the FUTA and FICA and income tax withholding statutes." 479 F.2d at 392.[2] Subsequently, the

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[1] Even the court below acknowledged that the three statutory definitions are "for present purposes identical. . . ." Pet. App. B, p. 7a. And before this Court decided *Central Illinois*, the government itself consistently had argued that "wages has the same essential meaning under all the statutes here in question." *Royster Co.* v. *United States*, 479 F.2d at 390.

[2] Certiorari was granted in *Central Illinois* in order to resolve the conflict with *Royster* with respect to income tax withholding. *See* 435 U.S. at 24.

Seventh Circuit in *Oscar Mayer* held that the fair market value of the incidental personal use of company cars by employees did not constitute "wages" for purposes of FICA and FUTA taxes.[3] The court concluded that "the reasoning of *Central Illinois* regarding the concept of 'wages' directly applies and calls for rejection of these FICA and FUTA taxes." 623 F.2d at 1228. Finally, the Court of Claims held in *Hotel Conquistador* that the fair market value of meals provided by the employer on its premises and for its convenience does not constitute "wages" giving rise to an obligation to pay or withhold FICA and FUTA taxes.

The decision below squarely conflicts with these three decisions. Indeed, the court of appeals in this case expressly noted the conflict, stating that "we are unable to agree with the rationale adopted by the Court of Claims in *Hotel Conquistador*. . . ,"[4] Pet. App. B, p.

[3] In *Oscar Mayer*, the government originally took the position that such fair market value constituted "wages" for the purpose of income tax withholding as well. That position was abandoned after this Court's decision in *Central Illinois*. *See* 623 F.2d at 1224-25.

[4] The court below relied upon 26 C.F.R. §§31.3121(a)-1 and 31.3306(b)-1, which provide that "ordinarily" the value of meals or lodging constitutes "wages" because "generally" such items are furnished as remuneration. *See* Pet. App. B, p. 6a. The Court of Claims in *Hotel Conquistador* quite properly refused to accept those regulations as controlling:

> Viewed as a hunting license to authorize IRS agents to flush up additional revenue from employers, the regulation is brilliantly conceived. As a guide to employers in their relations with employees, it is nearly worthless. . . .
>
> We think in any case when the only guide to Treasury policy was the unsatisfactory regulation above quoted, the employer should not be assessed for not withholding unless he could have told from the statute itself that his proposed free food or lodging for employees was "remuneration," and in this regard, the statute should be given a fairly strict though not hostile construction.

597 F.2d at 1354.

12a, and that "we are unable to subscribe to [the] conclusion [of the courts in *Royster, Oscar Mayer*, and *Hotel Conquistador*]," *id.* This Court should grant review in order to resolve this acknowledged conflict among the lower federal courts.

2. The Question Presented Is Important To The Administration Of FICA And FUTA Taxes.

The decision in this case will have a direct impact on employers and employees in all industries where workers must be quartered on the job site, including many members of the *amicus* Association and their employees. Beyond that, the decision can be expected to affect the FICA and FUTA tax liabilities of thousands of employers in other industries that who find it appropriate, for their own convenience, to furnish meals, lodging, or other similar items to employees.

An indication of the significance of the question presented to the administration of FICA and FUTA taxes was provided by the government in its petition for certiorari in *Hotel Conquistador*:

> [W]e are advised by the Internal Revenue Service that there are currently 630 cases pending at the audit and appellate administrative levels involving the meals-as-wages issue, with $11,544,720 in FICA and $739,077 in FUTA taxes at stake. There are also 17 cases pending in litigation regarding this issue, involving approximately $1,092,000 in FICA and FUTA taxes. The question whether similar fringe benefits constitute FICA and FUTA "wages" is present in 1,331 cases at the audit and appellate levels, involving $24,097,130 in FICA taxes and $704,222 in FUTA taxes. Finally, there are nine cases in litigation involving FICA and FUTA taxes on such fringe benefits, involving approximately $236,000.

Pet. 9-10, No. 79-742 (footnotes omitted). The conflict created by the decision below throws this area of the law into greater confusion and uncertainty and substantially increases the need for authoritative resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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